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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/730,413

12/08/2003

Xiang Liu

Liu 25-18-17-7

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7590

07/08/2008

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EXAMINER

PASCAL, LESLIE C

ART UNIT

PAPER NUMBER

2613

MAIL DATE

DELIVERY MODE

07/08/2008

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<p align="center"><b>Advisory Action</b> <b>Before the Filing of an Appeal Brief</b></p>	<b>Application No.</b> 10/730,413	<b>Applicant(s)</b> LIU ET AL.	
	<b>Examiner</b> Leslie Pascal	<b>Art Unit</b> 2613	

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 18 June 2008 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires \_\_\_\_\_ months from the mailing date of the final rejection.  
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

#### AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);  
(b) ☐ They raise the issue of new matter (see NOTE below);  
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
The status of the claim(s) is (or will be) as follows:  
Claim(s) allowed: \_\_\_\_\_.  
Claim(s) objected to: \_\_\_\_\_.  
Claim(s) rejected: \_\_\_\_\_.  
Claim(s) withdrawn from consideration: \_\_\_\_\_.

#### AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

#### REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.  
12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_  
13. ☐ Other: \_\_\_\_\_.

/Leslie Pascal/  
Primary Examiner  
Art Unit: 2613

Continuation of 11. does NOT place the application in condition for allowance because: The applicant feels that the finality should be withdrawn because in the office action of 7-27-07, the examiner said that the Moeller reference constitutes prior art only under 102(e). There were three suggestions listed in the office action. The applicant argues that because the reference qualifies as art under 102(a) the suggestions made in the office action of 7-27-07 do not apply. If the affidavit filed with the previous office action had overcome the 102(e) rejection, it would also have overcome the 102(a) rejection. The affidavit did not overcome these portions of 102 which say that the publication was filed TO ANOTHER. The affidavit did not overcome this in 102(e) because the affidavit did not provide that the reference and the application were made by the same inventive entity. It is a moot point that 102(a) might have applied, because the applicant cannot overcome the 102(e) rejection for the same reason that he cannot overcome a 102(a) rejection. The applicant's statement that none of the options suggested by the examiner would have been effective. This is not true. If the applicant had provided an affidavit that properly overcame the 102(e), it would have properly overcome the 102(a) rejection. The fact in the case are the reason that the applicant cannot use an affidavit to overcome these sections of 102 (because the applicants are not the same inventive entity as the reference).

With regard to the applicants' arguments, see *KSR Int'l Co. v. Teleflex, Inc.*, No 04-1350 (U.S. April 30, 2007) which rejected a rigid application of the "teaching, suggestion, or motivation" test.

With regard to the applicants' arguments, the applicant argues that the examiner used only hindsight to provide the motivation. It is well known to utilize a sampling window that is less than the bit period in order to avoid signals that have drifted due to jitter from being sampled. Further, it is well known to use a sampling window toward the middle of the bit period in order to ensure the best sampling in order to avoid problems from jitter. In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

The applicants' second argument is that the examiner's rationale is improperly biased because it only considers the possible benefits of using a relatively narrow sampling window while completely ignoring the possible detriments of such use. In that it is well known to avoid jitter by using a sampling window smaller than the bit period, the benefits outweigh the detriments. The applicant has not explained why it would not have been obvious.

The applicants' third argument is that the examiner has used an "obvious to try" rationale. This does not appear to be true because the examiner has given benefits. In that it is well known to use a sampling window smaller than a bit period in order to provide the best signal, it is not considered "obvious to try".

In regard to the applicants' argument that utilizing the eye diagram in order to determine the sampling window. It is well known that in order to provide the best sampling window, it would be in the middle of the bit period. It would have been obvious to use the eye opening in order to select the sampling window width based at the center of the sampling window.